

Byrne, Andrew

From: Jefferson, Tricia
Sent: Monday, November 24, 2014 10:41 AM
To: Besougloff, Jeff; Baca, Andrew; Byrne, Andrew
Cc: Epp, Timothy
Subject: FW: Trans Mountain Pipeline Expansion Project
Attachments: Lummi_NMFS letter signed 101614 (2).pdf

Hi all,

Joe and I received the email below from Region 10 ORC. I wanted to check in with you all to make sure you were in the loop on this matter given that the region is contemplating taking action with the NEB beyond filing a comment. We have a call with ORC this afternoon to discuss their legal options.

I will let you know if there are any further developments. And just a heads up - I am out of the office Tuesday – Friday.

Thanks,

Tricia

Tricia Jefferson
U.S. EPA
Office of General Counsel
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From: Weber, Courtney
Sent: Friday, November 21, 2014 3:29 PM
To: Jefferson, Tricia; Edgell, Joe
Cc: Steiner-Riley, Cara; Epp, Timothy; Owens, Kim
Subject: Trans Mountain Pipeline Expansion Project

DELIBERATIVE PROCESS

Hi Tricia and Joe:

I'm emailing you about the Trans Mountain Pipeline Expansion Project in Canada. I think you may have been on some earlier email messages about the project. Recently, the Region received letters from four Puget Sound tribes that request EPA to file a motion with the Canadian National Energy Board that requests the NEB to suspend work on the environmental assessment until the NEB has consulted with, among other federal agencies, EPA. The legal theory behind the request would be that Section 18 of the CEAA requires the NEB to "consult and cooperate" with EPA. Attached is one of the letters (they are identical so I'm only attaching one).

I read through the Canadian Environmental Assessment Act and it appears to me that Earthjustice/Tribes have a good point. Section 18 of the CEAA states "[t]he responsible authority with respect to a designated project...must offer to consult and cooperate with respect to the environmental assessment of the designated project with any jurisdiction ... if that jurisdiction has powers, duties or functions in relation to an assessment of the environmental effects of the designated project."

As the Tribes note, "jurisdiction" does include "a government of a foreign state...." and "environmental effects" that are to be taken into account include "a change that may be caused to the environment that would occur...outside Canada...." The environmental assessment that the NEB is required to undertake for this project must take into account

“the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated projects....” CEAA s. 19(1).

The summary is that it does appear that NEB should have consulted with the U.S. (and, in turn, EPA and other such agencies) given the scope of the project which will increase tanker traffic in the Sound. NEB likely has to look at the environmental effects of the increase in tanker traffic as this will be a cumulative environmental effect under s. 19(1) of the CEAA.

At this point, the Region is a commentor in the process. I’m not sure what more Section 18 of the CEAA would provide us but given the language of that section (*i.e.*, “consult and *cooperate*”), it seems like Section 18 would provide us with something similar to being a NEPA cooperating agency. From what I can tell from the website, NEB never actually sent out an offer to consult as contemplated by Section 18 of the CEAA.

I have a couple questions that I would like to discuss with you:

1. Do you agree that the NEB should have offered to consult with the U.S. under Section 18 of the CEAA?
2. If so, does Section 18 provide us with more access to the process than what we are currently provided for as a commentor? I think the answer is yes but would like to explore this with you.
3. If yes, what would be our next steps if the Region wants to be more involved? Filing a motion? From what I can tell reading the NEB Hearing Process Handbook and looking at the Hearing Order on the project, we could file a motion with the NEB but I’m not sure if there are any other avenues into the process. I also assume we might want to coordinate with the other federal agencies that the tribal letters were directed to.

I will try to set up a meeting to discuss all this with you. In terms of timing, we are working on an interim CMS response right now. We would like to figure out the path forward in the next week or so.

Thanks!

--Courtney

Courtney Weber
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